

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC25-0709

ANTHONY FLOYD WAINWRIGHT,

Petitioner,

v.

RICKY D. DIXON,

Secretary, Florida Department of Corrections,
Respondent.

EMERGENCY MOTION FOR REHEARING

**EXECUTION SCHEDULED FOR
JUNE 10, 2025 at 6:00 P.M.**

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Pro bono Counsel for Petitioner

EMERGENCY MOTION FOR REHEARING

Petitioner, Anthony Floyd Wainwright, pursuant to Fla. R. App. 9.330, respectfully moves this Court to reconsider its May 27, 2025, Order instructing that, absent Rule 3.851 counsel Baya Harrison's adoption of the state habeas petition and accompanying motion for a stay of execution, the filings will be stricken. Mr. Wainwright submits that this Court has overlooked and/or misapprehended critical points of law and fact. Because of this, Mr. Wainwright respectfully requests that this Court consider the motion though it is only being filed by undersigned counsel.

In addition, due to this Court's May 28, 2025 Order, Mr. Wainwright attaches his Reply relating to his petition for writ of habeas corpus. Mr. Wainwright respectfully requests that this Court reconsider its order and permit him to file the attached Reply.

A. The Petition and Accompanying Stay Motion are Authorized

After Governor Ron DeSantis signed a death warrant setting Mr. Wainwright's execution date, this Court issued a scheduling order for the proceedings. In that order, the Court noted that "[a]ny writ petition that is to be filed, is due by 4:00 p.m., Tuesday, May 20, 2025." Order, May 9.

Pursuant to that order, Mr. Wainwright, through undersigned pro bono counsel, filed his petition for writ of habeas corpus on May 20 at

approximately 1:30p.m. Simultaneously, undersigned counsel filed a notice of appearance, a motion for a stay of execution, and an affidavit signed by Mr. Wainwright stating that he had consulted with her about the petition and “hereby consent[ed] to her representing me in this litigation.” Authorization, May 20. Mr. Wainwright further swore that his court-appointed registry attorney, Baya Harrison, had not communicated with him “about the petition or any other matter concerning my under-warrant litigation.” *Id.*

This Court issued an acknowledgement letter stating that it had received the habeas petition and accompanying documents. Acknowledgment Letter—New Case, May 20. The same day, the Court ordered the State to respond to the petition by 10:00 am on May 27, and permitted Mr. Wainwright until 10:00 am on May 28 to reply. Order, May 20.

The State filed its response on May 27. There, the State argued the petition should be dismissed as unauthorized because it was filed by undersigned pro bono counsel, rather than Mr. Wainwright’s court-appointed registry attorney, Baya Harrison. Response to Petition, May 27, at 2. In the circuit court, undersigned had moved for substitution of counsel and sought to file a Rule 3.851 motion raising claims that were discussed with and authorized by Mr. Wainwright. After a hearing, the circuit court issued an order permitting undersigned to appear as second-chair counsel but

designating Harrison as first chair. *Id.* at 3. In light of the circuit court’s ruling, the State claimed in its response to the petition that undersigned “circumvent[ed] the postconviction court’s unequivocal order . . . that lead counsel Harrison retained decision-making authority on all litigation matters.” *Id.* at 4. The State went on to address the merits and procedural aspects of Mr. Wainwright’s state habeas claim. *See id.* at 11-41.

Shortly before 5pm on May 27—approximately 17 hours before Mr. Wainwright’s reply to the habeas petition was due—this Court issued an order stating in full:

On May 20, 2025, Terri Backhus [undersigned pro bono counsel] filed a petition for writ of habeas corpus and motion for stay of execution on behalf of Anthony Floyd Wainwright. Since Baya Harrison is lead postconviction counsel for Wainwright, it is ordered that Mr. Harrison file a notice adopting the habeas petition and motion for stay of execution. Failure to file such an adoption by May 28, 2025, will result in the striking of said filings.

All further filings on behalf of Wainwright in this case shall contain the signature of both counsel.

However, Mr. Wainwright submits that the habeas petition undersigned counsel filed on Mr. Wainwright’s behalf is an authorized filing for several reasons.

First, to the extent this Court relied on the circuit court’s designation of Harrison as lead counsel, that finding should have no weight in this Court. The basic premise of the judicial system’s structure is that appellate courts,

including this Court, review lower-court orders and issue binding opinions—not the other way around. See Art. V, § 3, Fla. Const. (setting out this Court’s jurisdiction, which includes reviewing the final judgments of trial courts).

That principle applies with even greater force here. The circuit court’s order pertained to Mr. Wainwright’s representation for purposes of his *postconviction motion* raised under Fla. R. Crim P. 3.851. But the *habeas petition* filed by undersigned counsel is an entirely new proceeding with a separate case number. The habeas claim presented in the petition for this Court’s review was never presented to or considered by the trial court, precisely because both the Florida Constitution and the Florida Rules of Appellate Procedure grant original jurisdiction in habeas proceedings to this Court. See Fla. R. App. Pro. 9.030(a)(3); Art. V, § 3(9), Fla. Const. (this Court has original jurisdiction to “issue writs of habeas corpus.”).

Nor is it uncommon for an individual to be represented by different counsel in habeas corpus proceedings than in their state postconviction proceedings. For example, Robert Bailey, a death-sentenced individual, was represented by court-appointed registry counsel for purposes of his Rule 3.851 motion but filed a habeas petition through separate pro bono counsel. *Compare Bailey v. State*, SC2012-1041 (docket for 3.851 appeal showing representation by registry attorney Clyde Taylor), with *Bailey v. Jones*,

SC2015-0969 (docket for habeas petition showing representation by pro bono attorney Sonya Rudenstine). The order in Mr. Wainwright's case deviates from the typical practice this Court has followed in similar situations where separate state habeas counsel have been permitted to represent their client for purposes of those proceedings once they have filed a petition on their behalf.

Second, undersigned counsel followed the applicable rules of appellate procedure in noticing her appearance in this Court, and the plain language of the appellate rules permitted her appearance. Simultaneously with the habeas petition, undersigned counsel filed a notice of appearance in this Court. Undersigned counsel's notice complies with the relevant rules of appellate procedure regarding the appearance of counsel in an original proceeding before this Court. See Fla. R. App. Proc. 9.360(b), 9.440(b) ("An attorney of record for a party in . . . an original proceeding . . . will be the attorney of record throughout the same . . . original proceeding."). The rules regarding representation in the circuit court for purposes of postconviction proceedings have no bearing on Mr. Wainwright's representation in this Court exclusively for purposes of this original habeas proceeding.

Third, nothing about undersigned counsel's appearance in these

proceedings will cause delay or prejudice.¹ Undersigned counsel had previously represented Mr. Wainwright as his federal counsel from 2018 through 2022, knew Mr. Wainwright, and was familiar with the facts and procedural history of his case. As undersigned counsel represented in Mr. Wainwright's 3.851 proceedings, she meets the minimum qualifications to represent capital defendants under Fla. R. Crim. P. 3.112(k), as she has been representing capital defendants for decades. Additionally, her appearance as pro bono counsel will incur no costs to the State.

Nor was she attempting to enter a limited appearance in the case. Undersigned counsel entered an appearance to represent Mr. Wainwright for the entirety of these original proceedings, which will conclude either by Mr. Wainwright prevailing by obtaining relief, or else by his imminent execution date going forward as scheduled. To the extent this Court has promulgated rules prohibiting limited appearances in the circuit court due to litigation problems and delays that may arise when a warrant is signed, see Fla R. Crim. P. 3.851(b)(4), those fears are unfounded here.

Fourth, Mr. Wainwright expressly authorized undersigned counsel to file the habeas petition and represent him for purposes of litigating it in this

¹ Indeed, undersigned counsel timely filed the habeas petition and the reply is attached to this motion in order to comply with the Court's scheduling order.

Court. See Authorization, May 20. Mr. Wainwright stated under oath that his court-appointed registry counsel had not spoken or otherwise communicated with him “about the petition or any other matter concerning my under-warrant litigation.” Authorization, May 20. Thus, Mr. Wainwright would be unable to raise this habeas claim at all without undersigned counsel’s representation.

For all of the reasons described above, Mr. Wainwright’s petition was an authorized filing. To accord with its regular practice, this Court should reconsider its order instructing that, absent Rule 3.851 counsel Baya Harrison’s adoption of the state habeas petition and accompanying motion for a stay of execution, the filings will be stricken.

B. This Court’s Order Would Violate Mr. Wainwright’s Rights to Due Process and Equal Protection

Although there is no constitutional right to postconviction counsel, if a state opts to afford postconviction proceedings to indigent inmates, they “must comport with the Due Process and Equal Protection Clauses of the Fourteenth Amendment.” *Tamalini v. Stewart*, 249 F.3d 895, 902 (9th Cir. 2001); see also *Evitts v. Lucey*, 469 U.S. 387, 389 (1985) (“[W]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause.”); *Smith v. Att’y Gen.*, No. 22-12950, 2023 WL 2592286 (11th Cir. Mar. 22, 2023) (“There is no

federal constitutional right to a direct appeal or to postconviction review by the states, but once such a remedy is granted, its operation must conform to the due process requirements of the Fourteenth Amendment.”).

Florida law expressly provides that “individuals sentenced to death are entitled to the appointment of capital postconviction counsel for the purpose of pursuing **any** collateral attacks on their convictions and sentences.” *Barwick v. State*, 361 So. 3d 785, 790 (Fla. 2023) (emphasis added); see also § 27.7001, Fla. Stat. (“it is the intent of the Legislature . . . to provide collateral representation of any person convicted and sentenced to death in this state.”).

Chapter 27 thus not only codifies a statutory right to postconviction counsel, but defines the contours of Florida’s capital collateral proceedings. See generally § 27.711 (outlining the terms and conditions of appointed counsel in capital collateral proceedings). Thus, by providing a statutory mechanism for death-sentenced inmates to proceed on their collateral attacks, Florida has bound itself to the mandate that its processes conform to the due process requirements of the Fourteenth Amendment.

Such collateral attacks include state habeas proceedings. Accordingly, this Court’s order indicating it will strike Mr. Wainwright’s state habeas petition and accompanying motion to stay—with no notice

and less than two weeks before he is set to be executed—simply due to his choice of pro bono counsel, deprives Mr. Wainwright of his due process rights. This Court should grant reconsideration to prevent such a violation.

1. The State should not be allowed a say on matters related to Mr. Wainwright’s counsel

Mr. Wainwright’s state habeas petition; the accompanying motion for a stay of execution; undersigned counsel’s notice of appearance; and Mr. Wainwright’s notarized authorization of the foregoing have been pending in this Court since May 20, 2025. That same day, this Court accepted the filings and ordered Respondent to file a response by May 27, 2025. A full week passed—precisely one-third of the time until Mr. Wainwright’s scheduled execution date—with no noted concerns by the State or this Court regarding undersigned counsel’s representation in the original state habeas action. Then, within hours of Respondent’s response, which argued that the petition should be stricken because it was filed by undersigned counsel, and not Mr. Harrison, this Court’s Order issued. Thus, the Order is clearly responsive to the State’s arguments regarding the issue of Mr. Wainwright’s counsel.

But the party-opponent seeking to enforce Mr. Wainwright’s execution warrant should not be permitted input as to how decisions regarding his litigation are made and by whom. Allowing the State input in this manner,

when no prejudice ensues from undersigned counsel's representation of Mr. Wainwright in this matter, violates Mr. Wainwright's right to a fundamentally fair proceeding. See *Wilson v. Wainwright*, 474 So. 2d 1162, 1164 (Fla. 1985) (the basic requirement of due process in an adversarial system is that an accused be zealously represented at "every level"; in a capital case such representation is the "very foundation of justice"); *Ford v. Wainwright*, 477 U.S. 399, 424 (1986) (Powell, J., concurring in part and in the judgment) ("[F]undamental fairness is the hallmark of the procedural protections afforded by the Due Process Clause.").²

While the State is not prejudiced by undersigned counsel's representation in this matter, the prejudice to Mr. Wainwright is evident: at the request of an adverse party whose interest it is to have his claims denied, Mr. Wainwright will be stripped of his chosen counsel and lose access to the Court on his state habeas matter. This denies him due process of law. See *Melton v. State*, 56 So. 3d 868, 871 (Fla. 1st DCA 2011) ("[I]f a Florida court were to arbitrarily refuse to allow privately retained counsel to represent a postconviction petitioner voluntarily, such refusal would amount to a denial

² See also *Serra v. Mich. Dep't of Corrs.*, 4 F.3d 1348, 1358 (6th Cir. 1993) (Meritt, C.J., dissenting in part) (a judge "should not be allowed some broad discretion to choose the lawyer for the accused against his will....Neither should the prosecution be invited to use trial stratagems to defeat a defendant's choice of counsel.").

of due process ...”).³ Mr. Wainwright urges this Court to reconsider its Order and permit him to proceed in his pending state habeas while represented by undersigned counsel alone.

2. Mr. Wainwright was given no notice or opportunity to respond regarding the issue of his counsel in this action

Despite Mr. Wainwright’s state habeas petition and accompanying documents (including undersigned counsel’s notice of appearance) being pending for a full week in this Court, the State waited until its substantive reply to argue that the petition should be stricken. This Court’s subsequent Order—issued prior to the May 28, 2025, 10:00 a.m. deadline for Mr. Wainwright to file a substantive reply—rewards the State’s sandbagging and deprives Mr. Wainwright of notice or an opportunity to be heard on the issue

³ Failing to permit Mr. Wainwright to be represented by the pro bono counsel he authorized would indeed be arbitrary, as this Court has permitted such representation in indistinguishable under-warrant circumstances. See *Howell v. State*, 109 So. 3d 763, 773 (Fla. 2013) (“In reality, the trial court permitted Howell to exercise his choice of counsel by recognizing [retained counsel] as counsel of record...and since retained counsel filed their notice of appearance, they have filed motions, conducted discovery, and even filed the current appellate briefs with this Court.”). Notably, although appointed counsel was not removed in *Howell*, retained counsel alone signed the appellate briefs, and subsequently served appointed counsel along with opposing counsel. In *Howell*, retained counsel had neither prior familiarity with Mr. Howell’s case nor the extensive capital postconviction experience undersigned has. Inexplicably, Mr. Howell unlike Mr. Wainwright, was able to obtain counsel of his choice who advanced the claims of his choosing.

of his counsel.

This has created a fundamentally unfair situation and thus deprived Mr. Wainwright of his right to due process in his under-warrant proceedings. “[F]undamental fairness is the hallmark of the procedural protections afforded by the Due Process Clause.” *Ford v. Wainwright*, 477 U.S. 399, 424 (1986) (Powell, J., concurring in part and in the judgment). The right to due process entails “notice and opportunity for hearing appropriate to the nature of the case.” *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)). The opportunity to be heard must be “at a meaningful time and in a meaningful manner.” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); see also *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972); *Dep’t of Law Enforcement v. Real Property*, 588 So. 2d 957, 960 (Fla. 1991) (“Procedural due process serves as a vehicle to ensure fair treatment through the proper administration of justice where substantive rights are at issue. Procedural due process requires both fair notice and a real opportunity to be heard.”)

No such opportunity was given here. Mr. Wainwright is less than two weeks away from his scheduled execution date. With his authorization, undersigned counsel filed a state habeas petition that was pending for a full week—a full third of Mr. Wainwright’s remaining life, based on the scheduled

execution date—with no objection from the State. But, within hours of the State’s objection, and without waiting for Mr. Wainwright’s substantive reply, as the prior scheduling order contemplated, this Court has issued an directive without notice: Mr. Wainwright must either secure the approval of counsel who hasn’t made any effort to speak with him in approximately a decade and has repeatedly waived his rights without any consultation; or his sole avenue for pursuing equitable relief from his death sentence is forfeited.

Because this Court deprived Mr. Wainwright of an opportunity to address the State’s arguments or this Court’s concerns regarding his counsel, this Court has been left unaware of critical facts. Notably, although the circuit court holds no jurisdiction over this original proceeding and undersigned counsel was thus authorized to enter a sole notice of appearance (as detailed above), prior to doing so, and despite Mr. Harrison’s decision not to join the state habeas before he even had an opportunity to read it, undersigned provided him with a copy of it and offered him a role as co-counsel if he would like to appear in the matter. Mr. Harrison again declined.

Due process “is flexible and calls for such procedural protections as the particular situation demands.” *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). And, this Court has recently reaffirmed that due process still applies

to death-warrant proceedings. *Tanzi v. State*, -- So. 3d -- 2025 WL 971568 *2 (Fla. 2025). Although the State posits that at this juncture of Mr. Wainwright's litigation his rights are minimal, the reality is that with less than two weeks before his scheduled execution, Mr. Wainwright's need for access to the courts and counsel who will zealously pursue all potentially viable avenues on his behalf is at its apex. See *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913 (2003)⁴ Guideline 10.15.1(B) (when an execution is set, counsel has a duty to "*immediately take all appropriate steps to secure a stay of execution and pursue those efforts through all available fora.*") (emphasis added).

This is especially critical given Florida's oppressive warrant process, which restricts Mr. Wainwright's efforts to access the courts *pro se* or even to self-advocate outside of the courtroom. Mr. Wainwright's death warrant was signed with no advance notice to him that he would be the one selected out of dozens of warrant-eligible prisoners on Florida's death row. An execution date was set for a mere 32 days later. Upon the signing of the warrant, Mr. Wainwright was immediately moved—again with no notice—to a different facility and placed on restrictive "death watch" restrictions.

⁴ The United States Supreme Court endorsed the ABA Guidelines in *Wiggins v. Smith*, 539 U.S. 510, 523 (2003) ("[W]e have long referred [to the ABA standards] as guides to determining what is reasonable.").

On death watch, Mr. Wainwright cannot affirmatively make phone calls. He is dependent on his attorneys to schedule legal calls and visits. He cannot send emails, nor does he have access to his tablet. He is allowed only two ten-minute “social” calls per week, and only to individuals already on his social visitation list. Any other communications must be snail-mailed. As of this year, items mailed to individuals on death watch presently take approximately one to three weeks to reach them.

Due to the short warrant period, there is no feasible way for Mr. Wainwright to go through *Nelson* proceedings. He cannot raise his concerns directly to the court, as he is not present for any of the state-court proceedings (unless an evidentiary hearing is ordered). And he may not represent himself *pro se*. Fla. R. Crim. P. 3.851(b)(6). Put simply, Mr. Wainwright is more dependent on his counsel during under-warrant proceedings than at any other stage of his legal process. Depriving him of the ability to have any say in who represents him—and, by association, which claims are brought on his behalf—denies him any meaningful access to the courts and any opportunity to be heard in a meaningful matter.

3. Refusing to allow Mr. Wainwright to proceed with undersigned counsel would violate Equal Protection

It is well-established that criminal defendants who are not indigent are entitled to proceed with their chosen retained counsel, provided no conflict of

interest exists. See *U.S. v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006) (“We have previously held that an element of [the right to counsel] is the right of a defendant *who does not require appointed counsel* to choose who will represent him.”); *Powell v. Alabama*, 287 U.S. 45 (1932) (“It is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice”); *id.* at 69 (“If in any case, civil or criminal a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.”).⁵

This Court has repeatedly affirmed the opportunity to substitute counsel of a defendant’s choosing in capital cases. See *Merck v. State*, 216 So. 3d 1285 (Fla. 2017) (“Rule 2.505(f)(2) authorizes the termination of an attorney’s appearance through substitution of counsel, which is the method that [counsel seeking substitution] sought in this case after we specifically directed her to do so ...”); *Wilson v. State*, Case No. SC24-1345 (Fla. Oct. 8, 2024) (granting motion for substitution of counsel filed in the

⁵ See also *Randolph v. Secretary, Penn. Dep’t of Corrs.*, 5 F 4th 362, 378 (3d Cir. 2021) (for this right to be meaningful, courts must provide “every reasonable accommodation to facilitate that representation, provided that the selection and retention of that counsel will not substantially prejudice the prosecution” or impair a court’s ability to proceed).

Florida Supreme Court pursuant to Fla. R. Jud. Admin. 2.505(e)(2)) *Jones v. Jones*, Case No. SC15-968 (Fla. May 28, 2015) (this Court permitting counsel who was not counsel of record in the circuit court to litigate a state habeas petition); *Bailey v. Jones*, Case No. SC15-969, 2015 WL 9257903 (Fla. Dec. 14, 2015) (same); *Ponticelli v. State*, Case No. SC03-17 (Fla. Sept. 10, 2003) (private counsel entered notice of appearance to represent Ponticelli as retained counsel; registry counsel did not withdraw and was not substituted); *Zack v. State*, Case No. SC03-1374, SC04-201 (Fla. Dec. 18, 2003) (private counsel entered a notice of appearance to represent Zack as retained counsel; registry counsel withdrew after private counsel's notice of appearance was filed); *Coleman v. State*, Case No. SC04-1520 (Fla. Feb. 16, 2005) (same); *Groover v. State*, Case No. SC04-86 (Fla. May 21, 2004) (allowing pro bono counsel to file motion for substitution).

Although there is no Sixth Amendment right for an indigent defendant to obtain specific counsel of his choice at the State's expense, the calculus is completely different when—as here—the defendant seeks to proceed in his death penalty litigation while represented by well-qualified pro bono counsel who is familiar with the specific client and case, and able to proceed on the Court's predetermined schedule. See *Caplin & Drysdale, Chartered v. U.S.*, 491 U.S. 617. 625-25 (1989) (“the Sixth Amendment guarantees a

defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, ***or who is willing to represent the defendant even though he is without funds.***)⁶ To deny Mr. Wainwright representation by undersigned counsel in these proceedings, when the right to proceed with counsel of choice would be a 'done deal' for a similarly situated wealthy defendant, violates Equal Protection under the Law.

CONCLUSION AND RELIEF SOUGHT

WHEREFORE, this Court should grant rehearing and reconsideration of its May 27, 2025, Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

⁶ See also *Melton*, 56 So. 3d at 873 (§ 27.711 “should not be interpreted to cut off the long-established right of a party to retain counsel of his or her choice....[T]he Legislature intends to contain the costs of collateral representation, not to strip a disfavored group of rights all citizens have long enjoyed.”).

I HEREBY CERTIFY that a true and correct copy of the foregoing pleading has been furnished by electronic service to all counsel of record on this 28th day of May, 2025.

/s/ Terri L. Backhus
Terri L. Backhus

CERTIFICATION OF TYPE SIZE AND STYLE

This is to certify that this Response has been reproduced in a 14-point Arial type, a font that is not proportionately spaced.

/s/ Terri L. Backhus
Terri L. Backhus

ATTACHMENT A

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC25-0709

ANTHONY FLOYD WAINWRIGHT,

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REPLY IN SUPPORT OF
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**EXECUTION SCHEDULED FOR
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PRELIMINARY STATEMENT

Pursuant to this Court's scheduling order, Mr. Wainwright filed his petition for writ of habeas corpus on May 20. The State filed a response, and this reply follows. Before responding to the State's arguments pertaining to his claim, Mr. Wainwright will briefly address two ancillary issues raised by the State.

First, the State argues that the petition should be dismissed as unauthorized because it was filed by undersigned pro bono counsel, rather than by Mr. Wainwright's court-appointed registry attorney, Baya Harrison. Response to Petition (hereinafter "Response") at 2. In the circuit court, undersigned had filed a motion for substitution of counsel. After a hearing, the circuit court issued an order permitting the undersigned to appear as second-chair counsel but designating Harrison as first chair. *Id.* at 3. In light of this ruling, the State claims that the habeas petition "is unauthorized and circumvents the postconviction court's unequivocal order" maintaining Harrison as first chair. *Id.* at 4.

The State's argument is at odds with the basic premise of the judicial system's structure that a trial court order does not bind this Court. See Art. V, § 3, Fla. Const. (setting out this Court's jurisdiction, which includes reviewing the judgments from final judgments of trial courts). That principle

applies with even greater force in this context. Mr. Wainwright's habeas petition is an original proceeding, with a separate case number, that was never considered by the trial court precisely because both the Florida Constitution and the appellate rules grant original jurisdiction in habeas proceedings to this Court. See Fla. R. App. Pro. 9.030(a)(3); Art. V, § 3(9), Fla. Const. (this Court has original jurisdiction to "issue writs of habeas corpus.").

The trial court's order regarding Mr. Wainwright's Rule 3.851 proceedings in the circuit court should have no bearing on his representation in the habeas proceedings initiated in this Court.¹ Undersigned counsel followed the applicable rules of appellate procedure when she noticed her appearance in this Court. See Fla. R. App. Proc. 9.360(b), 9.440(b) ("An attorney of record for a party in . . . an original proceeding . . . will be the attorney of record throughout the same . . . original proceeding."). Simultaneously with her notice of appearance, undersigned filed an affidavit

¹ It is not uncommon for an individual to be represented by separate counsel in habeas corpus proceedings. For example, Robert Bailey, a death-sentenced individual, was represented by court-appointed registry counsel for purposes of his Rule 3.851 motion but filed a habeas petition through separate pro bono counsel. *Compare Bailey v. State*, SC2012-1041 (docket for 3.851 appeal), *with Bailey v. Jones*, SC2015-0969 (docket for habeas petition).

from Mr. Wainwright consenting to her representation for purposes of the habeas petition and authorizing its filing. The petition is authorized by rule, by practice, and by Mr. Wainwright.

Second, as to Mr. Wainwright's request for oral argument, the State alleges that "[t]his Court's standard policy is not to conduct oral arguments in active warrant cases." Response at 6. The State cites no authority for this proposition, and in fact, the appellate rules state that "[o]ral argument may be permitted in *any* proceeding." Fla. R. App. Proc. 9.320 (emphasis added). The State recognizes that this Court has previously granted oral argument under warrant in *Asay v. State*, 210 So. 3d 1 (Fla. 2016), but distinguishes that case from Mr. Wainwright's because it dealt with "obviously[] significant issues." *Id.* at 6-7. This Court has the ability and the authority to grant oral argument in these proceedings. Because Mr. Wainwright raises a claim of fundamental importance that will determine whether he lives or dies, it should do so here.²

² The State also complains that "[t]he [p]etition also evades the 25-page limit on successive motions." Response at 8, n.5 (citing Fla. R. Crim. P. 3.851(h)(5)). This logic is clearly flawed, for two independent reasons. First, this Court authorized the filing of a separate habeas petition in its scheduling order, in addition to an initial brief addressing the circuit court's order on his Rule 3.851 motion. Clearly, this Court contemplated that the two pleadings would address distinct claims. Second, the page limitations of Rule 3.851 do not apply to a habeas petition, which is a separate action originating in this

ARGUMENT IN REPLY

I. The State misconstrues Mr. Wainwright's manifest injustice argument and there is no impediment to this Court's review of the claim's merits.

The State erroneously reads Mr. Wainwright's single claim as "seven designated Grounds for relief . . . [with] multiple legal theories" that are "barely articulated or non-[existent], absent an argument of manifest injustice." Response at 8. Yet manifest injustice is precisely the claim Mr. Wainwright is raising.

In his petition, Mr. Wainwright argued that the Court should reconsider its prior rulings in his case because the multiple systemic failures that occurred throughout his proceedings prevented him from obtaining meaningful review of his constitutional claims and, as a result, his death sentence and execution are manifestly unjust. Mr. Wainwright outlined six broad categories of constitutional rights violations relating to, among other issues, his counsels' inability to safeguard his rights; post-trial developments in the DNA testimony used to convict him; mental-health evidence lessening his personal culpability; and numerous flaws in the trial court's process for

Court. This Court routinely considers habeas petitions that exceed 25 pages. See, e.g., *Hutchinson v. Sec'y, Dep't of Corr.*, SC2025-0518 (77-page habeas petition); *Tanzi v. Sec'y, Dep't of Corr.*, SC2025-0372 (30-page habeas petition).

sentencing Mr. Wainwright to death. *See generally*, Petition at 6-48. Mr. Wainwright argued that the cumulative effect of these errors requires this Court's intervention to prevent a manifest injustice. Petition at 48-49.

The manifest injustice argument does not turn on the specific procedural- or merits-based rulings that this Court made in the past. Nor is Mr. Wainwright asking this Court to address issues previously presented to it by raising them as discrete claims. Rather, as he explained, until now this Court did not have before it the full quantum of information—including post-trial evidentiary developments and a long-standing pattern of pervasive constitutional deprivations—demonstrating that Mr. Wainwright's death sentence is manifestly unjust. *See* Petition at 7, 48-49. Each specific issue Mr. Wainwright discusses is simply one chain in the link of constitutional violations that produced a manifest injustice.

If anything, the State's extensive recitation of Mr. Wainwright's prior litigation as to these issues when raised one-by-one bolsters the need for this Court's equitable intervention to avoid a manifest injustice.³ Mr.

³ However, the State's argument that the petition constitutes an abuse of the writ is inaccurate and, again, hinges on a fundamental misunderstanding of Mr. Wainwright's claim. Mr. Wainwright's manifest injustice argument requires a cumulative review of the effect of the pervasive constitutional errors in his case, as opposed to the piecemeal litigation he was previously

Wainwright is not asking the Court to consider each violation in a vacuum as its own claim; holistic review of the whole picture is precisely one of the purposes of a habeas petition that this Court envisioned. *See Baker v. State*, 878 So. 2d 1236, 1246 (Fla. 2004) (the writ of habeas corpus “is enshrined in our Constitution to be used as a means to correct manifest injustices and its availability for use when all other remedies have been exhausted[.]”) (Anstead, C.J., joined by Pariente and Lewis, JJ., specially concurring).

II. The State employs the wrong standard for manifest injustice

The State acknowledges that “this Court ‘has the power to reconsider and correct erroneous rulings in exceptional circumstances and where reliance on the previous decision would result in manifest injustice[.]’” Response at 11-12. However, the State then articulates an incorrect standard, conflating it with a showing of “actual innocence.” *See* Response at 13 (citing *House v. Bell*, 547 U.S. 518 (2006), and *Schlup v. Delo*, 513 U.S. 298 (1995)). This suggests that the State is confusing the “manifest injustice” doctrine under Florida law with the “fundamental miscarriage of justice” exception in federal habeas.

forced to engage in. He could not have raised this claim previously, and therefore, there is no abuse of the writ.

But these are both terms of art, and they are not synonymous. While the federal habeas standard requires a showing of actual innocence, see *Schlup*, 513 U.S. at 326-27, manifest injustice does not. It has been identified in such situations as: the disparate treatment of codefendants;⁴ disparate treatment of similarly situated litigants;⁵ and “a rather technical pleading error” that had been overlooked by the lower courts on direct appeal and in postconviction.⁶ None of these injustices relate to actual innocence.

Ultimately, the manifest injustice doctrine turns on this Court’s discretion to exercise its equitable power due to the extraordinary circumstances presented by Mr. Wainwright’s case. This equitable authority is entirely independent from federal law and is appropriate here. In light of the pervasive, systemic constitutional violations that occurred throughout Mr. Wainwright’s case, this Court can and should revisit its prior procedural rulings to prevent a manifest injustice.

III. The State does not address the cumulative impact of the post-trial evidentiary developments in Mr. Wainwright’s case that warrant this Court’s equitable intervention.

⁴ *Johnson v. State*, 226 So. 3d 908, 910 (Fla. 4th DCA 2017).

⁵ *Stephens v. State*, 974 So. 2d 455, 457 (Fla. 2d DCA 2008).

⁶ *Figueroa v. State*, 84 So. 3d 1158, 1162 (Fla. 2d DCA 2008); see also *State v. Akins*, 69 So. 3d 261, 268 (Fla. 2011).

Although it provides a detailed recitation of this Court's prior rulings as to individual claims, the State largely ignores the argument Mr. Wainwright actually raised as to how the cumulative impact of post-trial developments renders his death sentence and execution a manifest injustice.

For example, the State alleges that "[Mr.] Wainwright cannot demonstrate a manifest injustice would occur because there is no question about his guilt of the first-degree murder, rape, and other crimes, given both the DNA results and his confessions." Response at 14; see *also* Response at 39-40. This argument is flawed for two reasons.

First, the State's focus on guilt fails to address the cumulative impact of the constitutional errors on Mr. Wainwright's death sentence. As noted above, a finding of manifest injustice is *not* tied to a finding of actual innocence; the inquiries are wholly distinct and have no bearing on each other. The pervasive, systemic nature of the constitutional violations—frequently committed by State actors, whether prosecutors, court-appointed attorneys, or the lower courts—in Mr. Wainwright's case warrants relief from the death sentence that the State seeks to impose on him, even assuming his convictions remain intact.

Second, the State's references to DNA and a confession fail to account for the post-trial evidentiary developments Mr. Wainwright detailed in his

habeas petition that exposed critical flaws in each of those pieces of evidence. For example, Mr. Wainwright only began making purportedly inculpatory statements while he was with law enforcement without his attorney present. R. 2587, 2589. Prior to this, he had consistently stated “that he in no way touched [the victim] in any manner.” He also disputed that he acted as a triggerperson. R. 2589, 2626-28; *see also* Petition at 9, 19.

Regarding DNA, as Mr. Wainwright extensively sets out in the petition, the DNA evidence presented at trial has now been substantially undermined. *See* Petition at 19-27. The samples that the DNA analyst examined and testified at trial were “semen” that allegedly belonged to Mr. Wainwright cannot be said to be sperm/semen. Petition at 22. At no point was any alleged DNA of Mr. Wainwright—sperm or not—determined to be in the same sample as the victim’s DNA in a manner that indicates Mr. Wainwright was involved in a sexual assault. *Id.* Additionally, this breakthrough in the DNA analysis corroborates a signed statement from Hamilton that Mr. Wainwright did not sexually assault the victim. *See id.* at 27. These new developments must be taken into account in a manifest-injustice analysis.

Where a trial has resulted in “incongruous and manifestly unfair results,” an appellate court has the “inherent authority to grant a writ of habeas corpus.” *Stephens*, 974 So. 2d at 457. Such a manifestly unfair result

will take place if this Court does not step in. Mr. Wainwright's death sentence is the product of multiple failures in the legal system that occurred at every stage of his proceedings, in both the state and federal courts.⁷ These failures have led to an incomplete and inaccurate picture of the case and of Mr. Wainwright's personal culpability that has infected this Court's prior rulings. This Court should exercise its inherent equitable authority to rectify the manifest injustice that will ensue if Mr. Wainwright's death sentence and imminent execution date are allowed to stand.

CONCLUSION AND RELIEF SOUGHT

This Court should grant Mr. Wainwright's petition for habeas corpus, stay his execution, and grant all other appropriate relief.

⁷ The State asserts that Mr. Wainwright "has had the benefit of and access to state and federal courts to pursue claims and the opportunity to seek appellate review." Response at 14. As Mr. Wainwright noted in his petition, however, the doors to federal court were conclusively shut when his prior federal counsel missed the deadline to file his federal habeas petition by six days. See Petition at 18. Given the stringent requirements that must be satisfied to file a second or successive habeas application, see 28 U.S.C. § 2244(b)(3), this renders federal-court review functionally a nullity. As for review in the trial court, this Court's under-warrant scheduling order required proceedings in the trial court to be concluded by May 20, 2025, and so review of his claims by that court is no longer possible either. And, now this Court has also imposed barricades to Mr. Wainwright's access to advance his claim. Mr. Wainwright urges this Court for consideration of his authorized petition for writ of habeas corpus. This Court alone has the authority to grant the equitable relief Mr. Wainwright seeks.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing pleading has been furnished by electronic service to all counsel of record on this 28th day of May, 2025.

/s/ Terri L. Backhus

Terri L. Backhus

CERTIFICATION OF TYPE SIZE AND STYLE

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